LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITIONER'S REPLY BRIEF

MURRAY A. GORDON,
Attorney for the Petitioner,
401 Broadway,
New York, N. Y.

TABLE OF CONTENTS

PAGE

I. § 349(a)(3) as here applied constitutes punishment 1

II. The legislative history of § 349(a)(3) demonstrates no congressional purpose to regulate foreign affairs. § 349(a)(3) was enacted and serves only to denationalize American citizens thought by the Congress to lack American allegiance. Since foreign military service is not conclusively or even reasonably demonstrative of a renunciation or lack of American citizenship or allegiance, § 349(a)(3) is unconstitutional 5

III. § 349(a)(3) is not a reasonable means of effectuating any foreign affairs function which may be intended to be served by § 349(a)(3) .. 10

IV. Marks did not voluntarily serve in the Armed Forces of a foreign state within the meaning of § 349(a)(3) 12

V. Marks is, in any event, not deportable 13

Conclusion 16

TABLE OF AUTHORITIES

Cases

Costello v. I & NS, 32 USLW 4130 14

Dean Milk Co. v. City of Madison, 340 U. S. 349 11

Fong Yue Ting v. United States, 149 U. S. 698 13

Kawakita v. United States, 343 U. S. 717 15
Kennedy v. Mendoza-Martinez, 372 U. S. 144 ....3, 4, 5, 10
Kunz v. New York, 340 U. S. 290 ..... 8n

Largent v. Texas, 318 U. S. 418 ..... 8n
Leng May Ma v. Barber, 357 U. S. 185 16
Lovell v. Griffin, 303 U. S. 444 ..... 8n

PAGE

McIlvaine v. Coxe's Lessee, 4 Cranch. 209 6

Nishikawa v. Dulles, 356 U. S. 129 ..... 7n, 9

Perez v. Brownell, 356 U. S. 44 .....3, 5, 7, 8n, 9, 10, 14
Podea v. United States, 179 F. 2d 306 (C. A. 2) 16

Rogers v. Quan, 357 U. S. 193 16

Schneider v. Rusk, No. 368, Oct. Term 1963 9
Schneider v. State, 308 U. S. 147 11

Talbott v. Jansen, 3 Dall. 133 6
The Santissima Trinidad, 7 Wheat. 283 6
Trop v. Dulles, 356 U. S. 86 ..... 3, 10

Worthy v. United States, 32 USLW 2440 (C. A. 5 1964) 14

United States Constitution

Amendment V 4

Amendment VI 4

Amendment VIII 4

Statutes

Nationality Act of 1940, 54 Stat. 1137 7

Nationality Act of 1940, § 401(C), 54 Stat. 1168 .... 7n, 8

8 USCA 1182, Immigration and Nationality Act of 1952, § 212, 66 Stat. 182 2

8 USCA 1201, Immigration and Nationality Act of 1952, § 221 15

8 USCA 1252, Immigration and Nationality Act of 1952, § 242, 66 Stat. 208 2

8 USCA 1253, Immigration and Nationality Act of 1952, § 243(h), 66 Stat. 208 ..... 2, 13

PAGE

8 USCA 1254, Immigration and Nationality Act of 1952, § 244, 66 Stat. 208 2

8 USCA 1451, Immigration and Nationality Act of 1952, § 340 14

8 USCA 1481, Immigration and Nationality Act of 1952, § 349, 66 Stat. 267 ..... 1, 3, 5, 7n, 8n, 9, 10, 11, 11n, 12, 15, 15n

8 USCA 1484, Immigration and Nationality Act of 1952, § 352, 66 Stat. 267 9

Texts and Articles

Borchard, Diplomatic Protection of Citizens Abroad 4, 6, 7, 11

Morrow, The Early American Attitude Toward the Doctrine of Expatriation, 26 Am. J. Int. Law 552 (1932) 6

Note, 54 Columbia Law Rev. 932 9

Roche, Loss of American Nationality: The Years of Confusion, 4 West Pol. Q. 268 (1951) 6

Roche, The Expatriation Cases, Supreme Court Review (1963) 325, pp. 332-333 ..... 7, 9

Tsiang, The Question of Expatriation in America Prior to 1907, pp. 11-24 6

3 Moore, International Law Digest, p. 552 6

Miscellaneous

H. R. Doc. 326, 59th Cong., 2nd Sess. (1907), pp. 163-164 9

Sen. Rep. No. 5151, 81st Cong., 2nd Sess., p. 749 8

United Nations Legislative Series, Laws Concerning Nationality St/Leg/Sec. B/4 (1954) and Supplement, St/Leg/Sec. B/9 (1959) 11, 11n

IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITIONER'S REPLY BRIEF

This reply brief is submitted by the petitioner pursuant to the permission granted by the Chief Justice at the oral argument to file such a brief within five days.

I

§ 349(a)(3) as here applied constitutes punishment.

The application of § 349(a)(3) to Marks has, for him, the following consequences:

1. He was arrested and detained in maximum security at the Federal Detention Headquarters for almost nine months solely for the alleged purpose of assuring his availability for deportation (see Pet. Br., pp. 8-10), although it was acknowledged by the respondent upon the oral argument before this Court that there is no country willing to

accept the petitioner as a deportee and therefore no place to which he can now be deported.

2. According to the determinations here under review, Marks has lost his American citizenship and, having acquired no other, he is stateless. If his status remains unchanged, Marks can be deported at any time to any country willing to accept him unless in the opinion of the Attorney General deportation to such a country would subject Marks "to physical persecution". Immigration and Nationality Act of 1952 (hereinafter referred to as "Act of 1952"), § 243(h); 8 U. S. C. A. § 1253(h).

3. Once judicial review of the final order of deportation is completed, the Attorney General may, in his discretion, detain Marks for a period of six months while undertaking to make further efforts to effect Marks' "departure from the United States". Act of 1952, § 242(c); 8 U. S. C. A. § 1252(c). And if Marks' deportation is not effected in that period of time, the statute provides that he "shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" (*ibid*).

4. Once deported, Marks cannot return to this country except with the Attorney General's consent. Act of 1952, § 212(a)(17); 8 U. S. C. A. § 1182(a)(17).

5. If, on the other hand, Marks is never deported, he will remain an alien at all times subject to "supervision" and risk of detention, as indicated, and ineligible for naturalization unless, after seven years and a showing by Marks of "good moral character" during that seven years, the Attorney General "in his discretion", and subject to review by the Senate and House of Representatives, suspends deportation and adjusts Marks' status to that of an alien lawfully admitted for permanent residence. Act of 1952, § 244; 8 U. S. C. A. § 1254.

The deplorable and unprecedented status of Marks as the result of the application of § 349(a)(3) to him is said by the respondent to be the unfortunate but merely incidental consequence of the regulatory objective of § 349(a)(3) and, therefore, non-punitive for constitutional purposes. *Perez* v. *Brownell*, 356 U. S. 44, which did not involve statelessness, is cited by respondent for the proposition that Marks' citizenship is being terminated only to terminate the foreign affairs problems actually or potentially created by petitioner's citizenship, not to punish Marks. *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, — which did involve statelessness and held the imposition of such a condition to be punishment—are said by respondent to be distinguishable because of a discernible legislative intent in those cases to punish, not merely regulate.

As will be seen at pp. 5-10, *infra*, the congressional purpose to impose loss of citizenship for an imagined lack of American allegiance underlies § 349(a)(3) just as it underlies § 349(a)(8) invalidated in *Trop* and § 349(a)(10) invalidated in *Mendoza*. Deprivation of citizenship for acts indicating disloyalty, such as the desertion involved in *Trop* [§ 349(a)(8)], the draft evasion involved in *Mendoza* [§ 349(a)(10)], and the foreign military service involved here [§ 349(a)(3)], not regulation of our foreign affairs is the evident congressional intent in this body of legislation. And when the result of such denationalization is statelessness, then the finding of punishment in *Trop* and *Mendoza* is applicable.

The facile formula that termination of citizenship to terminate problems created by such citizenship is regulatory merely and therefore non-punitive cannot serve to avoid the punitive nature and quality of the imposition of the terrifying condition of statelessness. Liquidating Marks physically would likewise liquidate the actual or potential problems purportedly created by him; but no such formula-

tion of a death penalty makes it any less a penalty. Similarly, incarceration of any criminal *pro tanto* terminates the problems he creates for society by terminating his liberty; his loss of freedom is no less a criminal penalty because of the "regulatory" purpose served by his imprisonment.

This Court observed in *Mendoza, supra*, at p. 168, n. 23, that

> "* * * forfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment."

The UN Secretariat's analysis of statelessness, entitled "A Study of Statelessness" (1949), p. 140, likewise points out that instances

> "* * * of individual forfeiture of nationality as a penalty are frequent and vary from country to country. In such cases, the State accuses one of its nationals of committing an act or adopting an attitude contrary to its interests.
>
> "The main grounds for deprivation of nationality as a penalty are ascertained to be the following:
>
> "(a) Entry into the service of a foreign government, more particularly, enrollment in the armed forces of a foreign country * * *"

Borchard's monumental "Diplomatic Protection of Citizens Abroad" also characterizes expatriation for foreign military service as a penalty (p. 687). The facility with which any punishment can be rationalized as a regulation, thereby circumventing constitutional safeguards applicable to punishment, warns against the efforts here to transmute involuntary statelessness into something other or less than the kind of devastating penalty which can be imposed by government only after full compliance with the provisions of the Fifth, Sixth, and Eighth Amendments.

II

The legislative history of § 349(a)(3) demonstrates no congressional purpose to regulate foreign affairs. § 349(a)(3) was enacted and serves only to denationalize American citizens thought by the Congress to lack American allegiance. Since foreign military service is not conclusively or even reasonably demonstrative of a renunciation or lack of American citizenship or allegiance, § 349(a)(3) is unconstitutional.

The statutory context of § 349(a)(3) is a body of legislation expatriating for repudiation or lack of allegiance to the United States. The other portions of § 349(a) denationalize for foreign naturalization [§ 349(a)(1)], taking a foreign oath of allegiance [§ 349(a)(2)], service in a foreign government [§ 349(a)(4)], voting in a foreign political election [§ 349(a)(5)], formal renunciation of American nationality [§ 349(a)(6), (7)], desertion [§ 349(a)(8)], treason or sedition [§ 349(a)(9)], and draft evasion [§ 349(a)(10)]. The common denominator of all the provisions of § 349(a) is, therefore, presumed disloyalty or disaffection on the part of American citizens. But since it is evident that no such disloyalty or repudiation of American allegiance or citizenship can be irrefutably presumed from the single circumstance of foreign military service (see Pet. Br., 29-31, 37; see also pp. 6-8, *infra*)—particularly in the absence of any requirement in § 349(a)(3) of an intent incompatible with American allegiance (see dissent of Stewart and White, JJ., in *Mendoza*, *supra*, at pp. 213 ff.)—the respondent expends much energy to demonstrate that § 349(a)(3) is an exercise of the foreign affairs power as § 349(a)(5) was found to be in *Perez*. While reference to the legislative history of § 349(a)(5) in *Perez* could support some such hypothesis in the case of § 349(a)(5), no comparable reading of the history of § 349(a)(3) is possible.

Voluntary expatriation for any purpose, including foreign military service, was not known at common law. 3 Moore, International Law Digest, p. 552; Tsiang, The Question of Expatriation in America Prior to 1907, pp. 11-24. During our Revolutionary War, and again during our Civil War, military service in the American armed forces by aliens such as the Marquis de la Fayette was not considered by this country to result in loss of foreign citizenship. *Talbott* v. *Jansen*, 3 Dall. 133, 164; 3 Moore, *supra*, at pp. 733-734. Prior to the first statutory declaration in the Act of 1868, 15 Stat. 223, of the right of Americans to voluntary expatriation, Congress refused on several occasions to adopt legislation dealing with denationalization for foreign military service. See Morrow, The Early American Attitude Toward the Doctrine of Expatriation, 26 Am. J. Int'l Law 552, 555-556 (1932); Roche, Loss of American Nationality: The Years of Confusion, 4 West. Pol. Q. 268, 274-277 (1951). It was, likewise, the general tendency of the early decisions to deny an expatriating effect to foreign military service. See, *e.g.*, *Talbott* v. *Jansen*, *supra*; *The Santissima Trinidad*, 7 Wheat. 283; *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209; see also Tsiang, *op. cit. supra*, at pp. 29-34, 61-68.

The Act of 1868 allowed voluntary expatriation, but did not specify the acts constituting such expatriation. In the administration of that Act, the manner and occasions of renunciation of American citizenship were determined by the State Department. The consistent interpretation adopted under the Act of 1868 was that foreign military service by a native born American without an oath of allegiance to the foreign state did not constitute the expatriating action authorized by that Act; the consequence attributed to such service was the withdrawal of diplomatic protection, not the withdrawal of citizenship. H. R. Doc. 326, 59th Cong. 2nd Sess. (1907), pp. 163-164; Borchard, *op. cit. supra*, pp. 711, 730, 766-776; 3 Moore, *op. cit. supra*, pp. 730-735; Tsiang, *op. cit. supra*, pp. 98-103. This

mode of treatment of foreign military service was codified in the Act of 1907, 34 Stat. 1228, and as late as 1916 one commentator wrote that:

> "It has been held almost uniformly that entrance into the military service of a foreign government, unless accompanied by an unqualified oath of allegiance, does not effect expatriation." (Borchard, *op. cit. supra*, at p. 711.)

The denationalization provisions of the Nationality Act of 1940, 54 Stat. 1137, were premised on the stated prevalent purpose to take citizenship from those who had transferred allegiance from this country to another. See Pet. Br., pp. 20-21. In this sense the Act of 1940 may be properly "regarded primarily as a codification" of the experience under the Acts of 1868 and 1907. *Perez, supra*, at p. 56. § 401(c) of the 1940 Act substantially codified the manner in which foreign military service had previously been handled by providing that such service was denationalizing where the soldier had or acquired the citizenship of the foreign state being served. In this fashion the Congress continued to manifest its understanding that denationalization for foreign military service involved an inquiry into the actor's intention to repudiate his American allegiance by such service and that such intention could not be conclusively presumed from such service in the absence of the acquisition of a foreign allegiance in conjunction with the foreign military service.[1] Roche, the Expatriation Cases, Supreme Court Review (1963), 325, at pp. 332-333. Indeed, the recent death of General of the

[1] To the extent that § 401(c) and § 349(a)(3) were also addressed to the purpose of avoiding conflicting claims of sovereignty in cases of dual nationals serving unwillingly in foreign armies, *Nishikawa* v. *Dulles*, 356 U. S. 129, has negated that purpose. (See Pet. Br., pp. 22-23.) Only voluntary foreign military service is potentially denationalizing, and those serving voluntarily are not likely to invoke American intervention to avoid such service and thereby provoke conflicting claims of sovereignty.

Army Douglas MacArthur recalls that at the time of the passage of § 401(c) he was a retired United States officer serving as Field Marshal in the armed forces of the Commonwealth of the Philippines at a fixed compensation.

We have already shown that the language of § 349(a)(3), which dispenses with the need for an oath of foreign allegiance or the possession or acquisition of foreign citizenship as a predicate for expatriation for foreign military service, resulted from the authoritatively expressed view of the Senate Judiciary Committee that denationalization for such service should not be dependent upon whether the foreign state being served makes citizenship in or an oath of allegiance to that state a condition of military service. Pet. Br., pp. 21-22. The explicit purpose for casting 349(a)(3) in its present form was to equate those who did not with those who did take an oath of allegiance upon entering a foreign army[2]. Sen. Rep. No. 5151, 81st Cong., 2nd Sess., p. 749. When this expression of purpose is considered against the history of 84 years following the Act of 1868, in which foreign military service in conjunction with a foreign oath of allegiance was deemed renunciatory of American nationality, it becomes clear that § 349(a)(3) involves expatriation for a supposed loss or transfer of

---

[2] § 349(a)(3) also added the provision that foreign military service would not be denationalizing if preceded by specific written authorization by the Secretaries of State and Defense. This provision was, no doubt, influenced by the prior practice of the State Department under the Acts of 1868 and 1907 in interpreting the kinds of foreign military service which could be deemed renunciatory of American citizenship. There is no indication in any of the hearings, debates, or reports that this provision reflects, as respondent claims, "a keen awareness of * * * foreign policy implications" (Resp. Br., p. 37). Since the mentioned provision would appear to vest unlimited and undefined administrative discretion to determine matters affecting fundamental personal rights, it gives rise to grave constitutional questions not raised or considered by *Perez*. See, *e.g.*, *Kunz* v. *New York*, 340 U. S. 290; *Largent* v. *Texas*, 318 U. S. 418; *Lovell* v. *Griffin*, 303 U. S. 444.

allegiance. Roche, *op. cit. supra*, at p. 332; Note, 54 Columbia Law Rev. 932, 942. For what Congress was saying when it enacted § 349 (a)(3) was that all foreign military service has the same expatriation significance as the foreign military service conjoined with a foreign oath of allegiance which, for almost a century, had been treated as a voluntary renunciation of American nationality. The legislative history of § 349 (a)(3) leaves no doubt, therefore, of the statute's sole and integral connection with matters of allegiance.

There is not a single authority cited by respondent,—or found in our research,—to support the respondent's suggestion that § 349 (a)(3), for any purpose here relevant, was directed at or intended to deal with matters coming within the scope of the power of the Congress in the area of foreign affairs. The commentaries referred to at page 54, Resp. Br., deal with the problems which were presented by naturalized Americans of dual nationality conscripted into armed forces of their native lands. These problems were largely resolved by the series of Bancroft treaties starting in 1868 discussed at pp. 27-28, 46. Resp. Br., *Schneider* v. *Rusk*, No. 368, Oct. Term 1963, and by the provisions of § 352 (a) of the 1952 Act [8 U. S. C. A. § 1484 (a)] for the denationalization of dual nationals who reside abroad. To the extent that the mentioned problems were not so resolved, the decision of this Court in *Nishikawa*, *supra*, has effectively demonstrated that § 349 (a)(3) cannot play any significant role in the field of dual nationals conscripted abroad.

Consequently the entire "foreign affairs" argument of respondent is one inspired by *Perez* but otherwise unsubstantiated, *i.e.*, that § 349 (a)(3) is an effort by the Congress to avoid the "embarrassment" which may be caused the United States by the foreign military service of one of its nationals. Unlike the legislative history of § 349 (a)(5) reviewed in *Perez*, not a single word is to be found in the legislative history of § 349 (a)(3) to support the "embar-

rassment" theory of constitutional power to expatriate for foreign military service. Our historic policy of withholding diplomatic protection from American nationals serving in foreign armies (including revolutionary forces) seems to have been so adequate in handling any such potential "embarrassment" (see pp. 6-8, *supra*) that it never occurred to anyone in or before the Congress or any of its committees to enlist any additional remedies. Unless imagination is to supply that which the Congress never proposed, provided, or intended, § 349 (a)(3) does not involve the exercise of the Congress of its powers in the conduct of the foreign affairs of the nation and cannot be constitutionally justified by any reference to those powers. In statutory and historical context, § 349 (a)(3), as the rest of § 349 (a), is directed at expatriating those American nationals the Congress believed to have demonstrated a transfer or a lack of allegiance to this country, and since that belief of the Congress has been expressed in effect as an irrebuttable presumption, § 349 (a)(3) is unconstitutional.

III

§ 349(a)(3) is not a reasonable means of effectuating any foreign affairs function which may be intended to be served by § 349(a)(3).

The majority in *Perez*, as well as the concurring opinions of Mr. Justice Brennan in *Trop* and *Mendoza*, require that the use of expatriation as a regulatory device can be constitutionally justified only if it fairly and reasonably effectuates the objective said to be involved. Here the object of § 349(a)(3) is said by the respondent to be the avoidance of "embarrassment" in the conduct of our foreign affairs, and expatriation is said by the respondent to be the only "effective means to cope with a citizen who participates in foreign military ventures" (Resp. Br., p. 60). Respondent cannot and does not point to anyone

in Congress who ever said so, and we are referred to no other authority in or out of Congress who joins in this view of the necessity of § 349(a)(3) to accomplish by expatriation what has historically been successfully accomplished by the withholding of diplomatic protection (see pp. 6-8, *supra*). The demonstrated availability of a technique amply sufficient to serve the purpose attributed by respondent to § 349(a)(3), without the destruction of nationality and resultant statelessness, constitutionally forecloses the utilization of § 349(a)(3). *Schneider v. State*, 308 U. S. 147, 162; *Dean Milk Co. v. City of Madison*, 340 U. S. 349 [9].

The experience of other nations in the treatment of foreign military service by their nationals is instructive. Not one major democracy in the world other than the United States automatically expatriates native born citizens for foreign military service without an opportunity to retire from such service on demand within a fixed period of time. See United Nations Legislative Series, Laws Concerning Nationality, ST LEG SER. B/4 (1954) and Supplement, ST LEG SER. B/9 (1959); see also Borchard, *op. cit. supra*, at p. 687 [10]. Plainly § 349(a)(3) cannot be sustained as a necessary or even a reasonably appropriate means to solve the alleged problem of potential "embarrassment" of our nation in the conduct of its foreign affairs: the insufficiency of the nexus between expatriation for

[9] § 349(a)(3), purportedly devoted to eliminating international tensions, as interpreted by respondent would give rise to perplexing international problems relating to the obligation of the United States to accept as a deportee native-born Americans expatriated and stateless under § 349(a)(3) but expelled by a foreign country.

[10] The respondent acknowledges that only Austria, Cuba, Germany, Indonesia, Iraq, Italy, Jordan, and Turkey have laws which "resemble" § 349(a)(3). Resp. Br., p. 60, n. 39. Germany, Iraq, Italy and Jordan, however, denationalize only after a failure to comply with a demand to discontinue military service. See Laws concerning Nationality, *supra*, at pp. 183, 243, 268, 269, 275, [illegible]

foreign military service and the foreign affairs power is not the result of any congressional ineptitude but only another confirmation that § 349(a)(3) was enacted to deal with expatriation for presumed repudiation of allegiance, not with the non-existent problem of national responsibility for the act of an individual serving in a foreign military force.

IV

Marks did not voluntarily serve in the Armed Forces of a foreign state within the meaning of § 349(a)(3).

The extensive discussion under this heading at pp. 43-68, Pet. Br., anticipates and meets virtually all respondent's arguments on the issue and requires no repetition at this point. Some of the respondent's more egregious errors concerning the record must, however, be cited.

We have pointed out that after the fall of Batista, the Rebel Army (or the Revolutionary Forces) did not wage war or train or prepare to wage war, but engaged, rather, in police, security, and civic functions. The Rebel Army in which Marks served after January, 1959 did not, therefore, have the distinctive characteristics of the armed forces of a foreign state as those terms are used in § 349 (a)(3). Those functions appear to have been taken over after January, 1959 by the state militia.

To meet this state of facts respondent states that:

> "petitioner and his colleagues in the Cuban Rebel Army bore arms, which were used for * * * training"

(Resp. Br., p. 19), although no such evidence is in the record. The Rebel Army is said by the respondent to have, after January 1959, "controlled the weapons, forts and military personnel" (Resp. Br., p. 21) without any supporting record reference. Law No. 600, which contem-

plated the integration of the Rebel Army into a newly formed Revolutionary Armed Forces (R. 271a), is incorrectly characterized as confirming "the dominance of the Rebel Army in the nation's armed forces after January 1, 1959" (Resp. Br., p. 23). According to respondent, "a large part of the Rebel Army remained in its quarters and was not involved in * * * civic functions" (Resp. Br., p. 27), but the record reference cited (R. 201a) fails to support the quoted text. Use is made by respondent (see Resp. Br., p. 29) of a statement made by petitioner to Immigration Service investigators under circumstances which made that statement so clearly inadmissible and so suspect (see Pet. Br., pp. 38-39) that neither the Service nor either of the courts below referred to or relied upon that statement in their determinations.

V

Marks is, in any event, not deportable.

A native-born American, made an alien because he is expatriated against his will, may not be deported. The power to deport is derived from the power to protect against unwanted immigration of foreign-born into this country. Deportation "is but a method of enforcing the return to his own country of an alien." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. The statutory definition of the places to which an alien can be deported evidences the congressional understanding that deportation contemplates an alien's return to his native land. See Act of 1952, § 243; 8 U. S. C. A. § 1253. Only the prospect of return to, rather than banishment from a homeland could possibly justify the plenary powers to expel and deport assumed by the Congress and sustained by this Court. In the absence of any express legislative assertion of the power to deport and banish a native-born with no other nationality, an intent to exercise such power should not be

implied. See *Perez*, *supra*, *at* p. 65 n. 6; see also *Worthy* v. *United States*, 32 USLW 2440 (C. A. 5, 1964).

In any event, *Costello* v. *I & NS*, 32 USLW 4130, disposes of both grounds relied upon by the Service here to sustain Marks' deportability.

1.

This Court held in *Costello* that conviction for a crime involving moral turpitude could not sustain an order of deportation under a statute which authorizes the deportation of an alien convicted of such a crime where the alien was a naturalized citizen when so convicted. Marks was a citizen when convicted in 1952 of the crime for which respondent now seeks to deport Marks. Under *Costello*, the petitioner here cannot be deported for his conviction of a crime at a time when his citizenship was intact.

2.

The Court below here held, and respondent argues that since Marks was "automatically" denationalized by his foreign military servic after January, 1959,[5] he was an alien when he returned to the United States in July, 1960 and excludable and therefore deportable for his failure to possess the entry documents required of an alien. In *Costello* it was similarly contended that Costello's denaturalization following his conviction was, by operation of law [Act of 1952, § 340(a); 8 U. S. C. A. § 1451(a)], expressly made retroactive to the date of naturalization so that Costello was an alien when convicted and therefore deportable. This contention was rejected for the reason that the statute providing for such retroactivity was not made explicitly applicable by the Congress to deportation. Here any relation-back application of denationalization

[5] It is not clear exactly at which moment during the period of that service between January 1959 and May, 1960 it is claimed by the Court below or the respondent that Marks lost his American citizenship.

under § 349(a)(3) can only be implied from the purpose of § 349(a)(3) since there is no retroactivity provided for by the statute.[6] Accordingly, even if § 349(a)(3) can be construed as automatically terminating an American's citizenship upon his entering into foreign military service for the purpose of terminating the problem created by his American citizenship, it does not follow that termination of such citizenship is retroactive for deportation purposes. For *Costello* establishes that denationalization cannot be deemed retroactive in order to sustain deportation unless expressly so provided by statute and there is here no such statutory provision. Petitioner's acknowledged right to test out judicially and *de novo* the controverted issues of fact and law determinative of his citizenship status under § 349(a)(3), make it particularly appropriate that any retroactive effect of § 349(a)(3) should be confined to fixing the time of his denationalization *vis-a-vis* the political and diplomatic responsibilities of the United States and should not be extended to fix the time of his denationalization for purposes of determining his deportability.

The impracticality of requiring entry documents of someone in Marks' status as of July 1960 confirms the propriety of the ruling of the District Court here that he was not deportable for failure to procure such documents. Visas are issued in contemplation of applicant who is an alien. See Act of 1952, §§ 221, 222; 8 U. S. C. A. §§ 1201,

---

[6] The Court of Appeals held here that § 350 of the 1952 Act, 8 U. S. C. A. § 1488, had the effect of making § 349(a)(3) retroactive by dint of the provision in § 350 that loss of nationality "shall result solely from the performance" of the prescribed denationalizing acts. We have already indicated this reading of § 350 is inconsistent with language of this Court in *Kawakita v. United States*, 343 U. S. 717, 730-731. See Pet. Br., p. 71. Moreover, since various subdivisions of § 349 plainly require intervening time [see, *e.g.*, § 349(a)(10)] or action [see, *e.g.*, §§ 349(a)(7), (8), (9)] between the denationalizing conduct and denationalization, § 350, which applies to all of § 349, cannot intend to provide for denationalization immediately upon the occurrence of the denationalizing conduct.

1202. The petitioner would have risked "a concession of serious if not fatal character" if he had sought and obtained a visa, assuming that one would have been issued and he could have completed the form outlined by the applicable statutes. *Podea* v. *United States*, 179 F. 2d 306, 309 (C. A. 2). Similarly, if Marks had applied for a certificate of identity pursuant to the Act of 1952, § 360(b) [8 U. S. C. A. § 1503(b)], as now suggested by respondent, Marks would have been entitled only to travel to a port of entry there to be subject to "proceedings involving aliens seeking admission to the United States." Act of 1952, § 360(c); 8 U. S. C. A. § 1503(c). In any resultant exclusion proceeding, as distinct from the instant deportation proceeding, the petitioner would not have been entitled to resist being sent to Cuba or any other country where he was subject to physical persecution. *Leng May Ma* v. *Barber*, 357 U. S. 185; *Rogers* v. *Quan*, 357 U. S. 193.

CONCLUSION

The judgment below should be reversed and the writ of habeas corpus prayed for should issue.

Respectfully submitted,

MURRAY A. GORDON,
Attorney for Petitioner.